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# Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony

Ronald L. Carlson\*

*We reject the notion that the expert may be used as a conduit for the introduction of otherwise inadmissible evidence.*<sup>1</sup>

## INTRODUCTION

The dispute over whether litigants may use experts to run unexamined hearsay into the trial record is a microcosm of a larger debate. The larger question is whether judicial review of expert testimony should be passive, or whether the expert witness process should be marked by active judicial policing. Does the plethora of expert opinions presently being offered in modern trials merit special scrutiny by the courts?

Some scholars urge that courts must accommodate experts. Proponents of this view favor few challenges to the unrestricted rendition of opinions by an expert, whether the expert is real or self-proclaimed. Under this approach, "[a]s long as the expert testified that he was qualified, that the data he used was of the type reasonably relied upon by other experts in the field, and that he was reasonably certain of his conclusions, judges would present the evidence to the jury without further scrutiny."<sup>2</sup> A passive judicial approach to expert testimony fa-

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The author thanks Judge Myron H. Bright, United States Court of Appeals for The Eighth Circuit, for providing helpful materials and ideas.

1. Department of Corrections v. Williams, 549 So. 2d 1071, 1072 (Fla. Dist. Ct. App. 1989).

2. L.L. Plotkin, Note, Brock v. Merrell Dow Pharmaceuticals, Inc.: *What is the Court's Role in Evaluating Expert Testimony?*, 64 TUL. L. REV. 1263, 1264 (1990) (citing Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 661-69 (1988)). For commentator views on hearsay generally, see Stephan Landsman and Richard F. Rakos, *Research Essay: A Preliminary Empirical Enquiry Concerning the Prohibition of Hearsay Evi-*

cilitates ready admission of the underlying data used by an expert to reach her conclusions. It means that rigorous application of hearsay doctrine, requiring that the author of the underlying hearsay document be present or at least have been cross-examined, is abandoned.

A growing number of courts and commentators have criticized the passive approach to expert testimony.<sup>3</sup> Some have urged strict control of runaway expert testimony. For example, the United States Court of Appeals for the Fifth Circuit has remarked: "It is time to take hold of expert testimony in federal trials."<sup>4</sup> To this end, Minnesota amended its evidence rules to embrace a policy prohibiting, on direct examination, the wholesale introduction of the background documents used by an expert to reach his or her conclusions.<sup>5</sup>

Which view is preferable? Which addresses modern pressures and current courtroom conditions? Should judges play an active role in policing expert testimony? This Article endeavors to resolve these issues, and suggests a solution to the problem of backdoor hearsay through expert opinion.

## I. SCOPE OF THE PROBLEM

Although a number of courts have been diligent in safeguarding against hearsay and confrontation violations,<sup>6</sup> some have ruled that records prepared by an out-of-court witness may be fully disclosed to the jury by an expert, provided only that the expert considered them in reaching her conclusions.<sup>7</sup>

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dence in American Courts, 15 LAW & PSYCHOL. REV. 65, 80-81 (1991) (summarizing justifications for the hearsay rule other than juror incompetence); Paul S. Milich, *Re-Examining Hearsay Under the Federal Rules: Some Method for the Madness*, 39 KAN. L. REV. 893, 893-928 (1991) (clarifying federal definition of hearsay and proposing methods for applying this definition).

3. See, e.g., *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 421 (5th Cir. 1987) (affirming active approach in which trial judge could closely examine the underlying data upon which an expert has based his conclusions); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1245 (E.D.N.Y. 1985) (requiring that trial judge determine whether hearsay underlying the expert's opinion satisfies "minimum standards of reliability"), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); Plotkin, *supra* note 2, at 1269-70 (arguing that active review of expert testimony will bring about more accurate and just verdicts, and enable trial judges to ensure that experts are acting as unbiased witnesses).

4. *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1234 (5th Cir. 1986).

5. See *infra* notes 52-56 and accompanying text.

6. See *infra* notes 22-40 and accompanying text.

7. See, e.g., *Lewis v. Rego Co.*, 757 F.2d 66, 74 (3d Cir. 1985) (in products

A number of decisions endorse this sort of "liberal" approach to admission of an expert's supporting data.<sup>8</sup>

In *Stevens v. Cessna Aircraft Co.*,<sup>9</sup> for example, following an airplane crash which killed the pilot, the pilot's widow brought a products liability action against the airplane manufacturer.<sup>10</sup> She claimed that the airplane was defective.<sup>11</sup> The defendant responded that the crash resulted from the pilot's misuse of the aircraft.<sup>12</sup> The defense's explanation for the alleged misuse came from a physician who made a study of the pilot's life by interviewing many of his associates.<sup>13</sup> The physician testified that the pilot was under a great deal of stress in his personal life and that this stress prevented him from main-

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liability action, error not to allow physical metallurgy expert to testify about substance of conversation with another metallurgist; although conversation was hearsay, it was type of data on which experts in field base their opinions, and "basis of an opinion may be testified to on direct examination"); *United States v. Affleck*, 776 F.2d 1451, 1457-58 (10th Cir. 1985) (in securities fraud prosecution, expert allowed to relate otherwise inadmissible hearsay statements, since offered not for truth but rather to explain how expert formed some of his conclusions and opinions); Peter J. Rescorl, Comment, *Fed. R. Evid.* 703: *A Back Door Entrance For Hearsay and Other Inadmissible Evidence: A Time for a Change?*, 63 *TEMPLE L. REV.* 543, 545-46 (1990) (citing examples of how courts have dealt with Rule 703).

For a decision citing the two distinct approaches to the issue discussed in this Article, see *First Southwest Lloyds Ins. Co. v. MacDowell*, 769 S.W.2d 954, 958 (Tex. Ct. App. 1989) (stating that the rule allowing that an expert "may" disclose facts or data underlying his opinion does not indicate absolute right of expert to disclose all facts and data under all circumstances, rather, the better position is that the rule does not allow admission on direct of unauthenticated underlying data). Cases on both sides are collected in Annotation, *Admissibility of Testimony of Expert, as to Basis of His Opinion, to Matters Otherwise Excludible as Hearsay—State Cases*, 89 A.L.R.4th 456 (1991).

8. See cases listed at *supra* note 7; see also Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 *VAND. L. REV.* 583, 584-85 (1987) (arguing that materials relied upon by the expert should be admitted as substantive evidence under certain guidelines).

Criminal cases have not escaped the sweep of the rule applied in some courts to permit open introduction of the specialist's supporting data. See, e.g., *United States v. Bramlet*, 820 F.2d 851, 856 (7th Cir.) (allowing government expert to predicate his opinion upon recorded observations of hospital staff members whom government did not call to testify), *cert. denied*, 484 U.S. 861 (1987); *People v. Anderson*, 495 N.E.2d 485, 488-89 (Ill.) (allowing defendant's expert to disclose on direct examination contents of materials relied on in forming opinion as to defendant's sanity), *cert. denied*, 479 U.S. 1012 (1986).

9. 634 F. Supp. 137 (E.D. Pa.), *aff'd*, 806 F.2d 252 (3d Cir. 1986).

10. *Id.* at 139.

11. *Id.*

12. *Id.*

13. *Id.* at 140.

taining the concentration necessary for piloting the airplane.<sup>14</sup> The doctor repeated for the jury key portions of his interviews.<sup>15</sup>

The jury returned a verdict for the manufacturer.<sup>16</sup> On appeal, the plaintiff challenged the adverse verdict on the ground that the expert's testimony included inadmissible hearsay.<sup>17</sup> The physician had corroborated his recounting of the out-of-court statements using tape recordings of the interviews.<sup>18</sup> The trial court had ruled that the tape recordings were properly admitted through the testimony of the expert in accordance with Rule 703.<sup>19</sup> The appeals court affirmed in an unpublished opinion.<sup>20</sup> When appellate courts follow this approach, a trial judge's refusal to allow an expert witness to report his conversations with outside experts may result in reversible error.<sup>21</sup>

Other courts, however, have not allowed litigants to use Rule 703 to bypass restrictions on hearsay testimony.<sup>22</sup> In *Gong*

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14. *Id.*

15. *Id.*

16. *Id.* at 141.

17. *Id.* at 142.

18. *Id.*

19. *Id.*

20. *Cessna Aircraft Co. v. Stevens*, 806 F.2d 252 (3d Cir. 1986).

21. *See, e.g., Lewis v. Rego Co.*, 757 F.2d 66, 74 (3d Cir. 1985) (where plaintiff's expert's opinion was based in part on conversation with another expert, plaintiff should have been allowed to inquire about that conversation on direct examination of expert witness).

22. *See, e.g., Marsee v. United States Tobacco Co.*, 866 F.2d 319, 323-24 (10th Cir. 1989); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 369 (Cal. Ct. App. 1981); *Hartman v. Yawger*, 514 A.2d 545, 549 (N.J. Super. Ct. Law Div. 1986); *Slaaten v. Amerada Hess Corp.*, 459 N.W.2d 765, 768 (N.D. 1990).

In *Marsee*, the United States Court of Appeals for the Tenth Circuit forbade experts from testifying in detail about hearsay data that helped them form their opinions. 866 F.2d at 323. The court stated that the expert could explain that he had consulted outside sources, but he could not give jurors a detailed description of the information the outside sources reported to him. *Id.* at 323-24. "The court also pointed out that, although the underlying facts of the opinion could not be brought out on direct examination, Rule 705 permits those same facts to be addressed by the opponent on cross-examination." *Rescorl, supra* note 7, at 551-52 (footnotes omitted).

In *Grimshaw*, the California Court of Appeals took a similar approach:

While an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible. . . . [H]e may not under the guise of reasons [for his opinion] bring before the jury incompetent hearsay evidence.

174 Cal. Rptr. at 369. Moreover, the court suggested that an instruction directing the jury to consider the hearsay or other background data only for the purpose of understanding the basis of the expert's opinion and not for the truth of the matter is an illusory remedy: "[I]n aggravated situations, where

*v. Hirsch*,<sup>23</sup> for example, Dr. Hirsch was treating the plaintiff, Ray Gong, and prescribed a drug which the plaintiff claimed caused medical problems.<sup>24</sup> Another physician, Dr. Schleinkofer, also treated the plaintiff.<sup>25</sup> A major evidentiary issue concerned a letter written by Dr. Schleinkofer to a third doctor. The letter stated in part: "Ray Gong . . . had a perforated peptic ulcer due to prednisone in May, 1986."<sup>26</sup> The plaintiff sought to introduce the letter during the testimony of a medical expert, Dr. Birnbaum.<sup>27</sup> The district court rebuffed the effort, and the appellate court upheld the exclusion.<sup>28</sup> Rule 703 of the Federal Rules of Evidence allows an expert who is on the witness stand to base his or her opinion on facts or data derived from a number of sources.<sup>29</sup> The appellate court stated, however: "We also note that, even assuming that the letter was considered the type of evidence reasonably relied upon by experts, Rule 703 does not automatically mean that the *information itself* is independently admissible in evidence."<sup>30</sup>

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hearsay evidence is recited in detail, a limiting instruction may not remedy the problem." *Id.*; see also *People v. Nicolaus*, 817 P.2d 893, 910 (Cal. 1991) (holding that while an expert may give reasons on direct for his opinions, he may not under guise of reasons bring before the jury incompetent hearsay evidence).

In *Hartman*, a New Jersey trial court considered whether a litigant could use an in-court expert as a conduit for otherwise inadmissible data. The court refused to allow the expert to testify about the data, stating that to permit the testimony "seems to this court to constitute a complete end run around the hearsay rule which is not warranted by the history of [the New Jersey Rule of Evidence based on Rule 703], its federal or California counterparts nor the relevant case law." 514 A.2d at 549.

In *Slaaten*, the trial judge stated that the fact that an exhibit is a document upon which an expert relied in giving an opinion "does not make the document admissible." 459 N.W.2d at 768. The North Dakota Supreme Court affirmed the exclusion of the exhibit. *Id.*

23. 913 F.2d 1269 (7th Cir. 1990).

24. *Id.* at 1271. Before he died, Ray Gong filed a diversity action against Dr. Hirsch, whom he said had prescribed the drug prednisone. *Id.* Gong complained that he suffered a perforated peptic ulcer as the result of Dr. Hirsch's negligence in prescribing the drug. *Id.* Alice Gong carried the malpractice suit to trial after her husband's death. *Id.*

25. *Id.* at 1272 n.2.

26. *Id.* at 1272.

27. *Id.*

28. *Id.*

29. FED. R. EVID. 703 advisory committee's note.

30. 913 F.2d at 1273. In *State v. Williams*, 549 So. 2d 1071 (Fla. Dist. Ct. App. 1989), the trial court had similarly rebuffed attempts to admit a hearsay affidavit through an expert. *Id.* at 1071. On appeal the defendant acknowledged that the affidavit was inadmissible as substantive evidence, but argued that the expert should have been able to testify to the document's contents.

In criminal cases, prosecutors have attempted to place out-of-court reports or opinions into the trial record through their experts. In *State v. Towne*,<sup>31</sup> for example, confrontation problems surfaced when the state called an expert in forensic psychiatry to testify that the defendant was competent. In developing his testimony, the prosecution's expert relied on a book written by a nontestifying doctor.<sup>32</sup> Moreover, the witness consulted with the book's author and informed the jury: "I would say that Doctor Rada is in concurrence with my opinion in this case."<sup>33</sup> In his closing argument, the state's attorney made a pointed reference to the consultation between the state's expert and Doctor Rada, saying: "And if you will recall [the doctor's] testimony he went to the man who wrote the book so to speak, Richard Rada, and asked him about his opinion and came back reinforced with what he concluded was a correct medical diagnosis. Thank you."<sup>34</sup>

The Vermont Supreme Court recognized that the expert's testimony concerning the nontestifying doctor's conclusions fell outside any recognized exceptions to the hearsay rule.<sup>35</sup> The court was not persuaded by the prosecution's justification that the outside evidence was offered simply to support and illustrate the basis for the courtroom expert's testimony.<sup>36</sup> It found

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*Id.* at 1072. The defendant argued that it was reasonable for the expert to rely on the facts contained in the affidavit. *Id.* The appellate court rejected this notion that an expert may be used as a conduit for the introduction of otherwise inadmissible hearsay: "In sum, while it was perfectly proper for the expert to consider the affidavit in formulating his opinion, the affidavit itself was hearsay and inadmissible." *Id.*

In deciding the *Williams* case, the Florida court made use of an earlier medical malpractice case which had utilized similar "conduit" language. *Id.* at 1072. In *Kuryinka v. Tamarac Hosp. Corp.*, 542 So. 2d 412 (Fla. Dist. Ct. App. 1989), the defense had introduced an uncorroborated laboratory report prepared by an outside laboratory, and argued on appeal that the evidence was admissible because the report was used by the defense experts as a basis for their opinion. *Id.* at 413. The District Court of Appeals reversed: "[A]n expert's testimony may not be used merely to serve as a conduit to place otherwise inadmissible evidence before a jury." *Id.* The court observed that business and medical records "cannot be admitted without a predicate demonstrating the authenticity of the records." *Id.*

31. 453 A.2d 1133 (Vt. 1982). The *Towne* case is discussed in Ronald L. Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234, 247-50. (1984).

32. 453 A.2d at 1134.

33. *Id.*

34. *Id.*

35. *Id.* at 1135.

36. *Id.* Sometimes courts justify the admission of underlying expert data on the grounds that it illustrates the basis for the expert's opinion, and is not

that the testifying expert gave his own opinion and then acted as a conduit for Dr. Rada's opinion.<sup>37</sup> The court concluded that using one expert to introduce a non-testifying expert's opinion violates the hearsay rule.<sup>38</sup> Further, the *Towne* court determined that the expert witness's recitation of the nontestifying doctor's opinion violated the Sixth Amendment right to confrontation because the defense was prevented from cross-examining and exploring the professional qualifications of the out-of-court declarant.<sup>39</sup> The Confrontation Clause violation in *Towne*

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offered as substantive evidence. See *supra* note 7. The refined distinction will likely escape the jury. It would seem that an appropriate analysis of the situation would not allow the Confrontation Clause to be frustrated by such indirection. See Carlson, *supra* note 31, at 245 n.44.

37. 453 A.2d at 1135.

38. *Id.*

39. *Id.* The ramifications of such reasoning for "summarizing" expert witnesses seem obvious. In *United States v. Lawson*, 653 F.2d 299 (7th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982), the court held that the government could not simply produce a witness who did nothing but summarize out-of-court statements made by others. *Id.* at 302. On summary witnesses generally, see *United States v. Williams*, 447 F.2d 1285, 1292 (5th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).

The opinion of a nontestifying expert may be invoked in a slightly different manner than that involved in *Towne*. For example, what if an expert states on the stand that she has consulted with two or three named experts, and that her opinion was reinforced by the discussions? Or that nobody with expertise disagreed with her? The case of *State v. Barrett*, 445 N.W.2d 749 (Iowa 1989), raises this issue. A pathologist testified that a decedent had not committed suicide, but was murdered. *Id.* at 751. On redirect examination the pathologist was asked whether any forensic pathologists with whom he had discussed the case gave him reason to change his opinion that the death was a homicide. *Id.* Over defendant's hearsay objection, the trial court allowed the expert to state that no, "[h]is colleagues had not caused him to change his opinion." *Id.*

An earlier case, *State v. Judkins*, 242 N.W.2d 266 (Iowa 1976), did not allow one expert witness to state that other experts subscribe to the expert's conclusion. *Id.* at 267-68. On this authority, the Iowa Supreme Court in *Barrett* held that the trial court had erred. 445 N.W.2d at 751. However, while the opinions of nontestifying experts should not have been invoked by indirection, the court did not consider this reversible error. *Id.* at 754.

In dissent, Justice Lavorato asserted that prejudicial error had occurred; the prosecutor's redirect examination was an obvious attempt to shore up the testimony of the state's expert.

Doing so by soliciting hearsay testimony concerning opinions of other experts had, I think, its intended effect. The evil in such a procedure, of course, lay in the defendant's inability to challenge these opinions through cross-examination. In my view, such unchallenged opinions on a critical issue served to tip the scales in favor of the State in a case that was obviously close. I would reverse and remand for a new trial.

*Id.* at 758 (Lavorato, J., dissenting).

The views expressed in the *Barrett* case are in accord with those contained



was fatal to the conviction.<sup>40</sup>

Courts need to apply the fine but nonetheless important line between allowing reliance on hearsay versus permitting full evidentiary recitation of the hearsay. As is apparent, some courts have allowed the entry of underlying data into the record.<sup>41</sup> In addition, even jurisdictions in which appellate courts enforce the hearsay rule are not free from problems at the trial level. Cases like *Towne* illustrate that recourse to appellate review is often necessary to enforce hearsay doctrine.<sup>42</sup> Such difficulties are unfortunate. Ready introduction of background material not only conflicts with accepted evidentiary norms, it may also deter states from adopting rules of evidence modeled after the Federal Rules. This problem will be addressed in the next section.

## II. WHICH APPROACH TO RULE 703 PROMOTES LAW REFORM?

States should be urged to adopt evidence codes patterned after the Federal Rules. Uniform rules would reduce forum shopping based upon variations in admission or exclusion of evidence, and eliminate the need for attorneys to maintain competence under multiple evidence codes. An interpretation of Federal Rule 703 that permits experts to introduce into the record otherwise inadmissible hearsay evidence may impede states from adopting similar rules of evidence.

Recent dialogue over whether Michigan should adopt Federal Rule of Evidence 703 illuminates this point. Michigan Rule of Evidence 703<sup>43</sup> deviates from the Federal Rules by allowing trial courts to require the independent admission of underlying data as a precondition to receipt of any expert's opinion. Thus, judges may bar expert opinions based upon out-of-court data. Under the Michigan rule, the opponent of an expert's testi-

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in Ronald L. Carlson, *Getting a Grip on Experts*, LITIG., Summer 1990, at 36, 36.

40. 453 A.2d at 1136.

41. See *supra* notes 7, 8, 39 (identifying cases where underlying data was admitted because it constituted the basis for the expert's opinion).

42. See *supra* notes 31-40 and accompanying text.

43. Michigan's Rule 703, entitled "Bases of Opinion Testimony by Experts," provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence.

MICH. R. EVID. 703.

mony can insist that all of the information upon which the expert bases an opinion be placed in the record before the expert testifies. Such an approach is similar to the pre-rule practice which prevailed in many federal courts.

An opponent of the adoption of the modern Federal Rule 703 has argued that, "The Federal rule gives the trial court no discretion in allowing or disallowing into evidence hearsay evidence reasonably relied upon by experts in the field of expertise in question."<sup>44</sup> The commentator summarized what he perceived to be the advantage of the Michigan rule over Federal Rule 703:

The Michigan rule precludes putting into evidence, through expert opinion, that which is totally and utterly inadmissible under the hearsay rules. The hearsay exceptions provide a large gap through which a proponent of certain evidence may steer the juggernaut of advocacy. Suppose that certain evidence is utterly inadmissible under any hearsay exception, yet the proponent needs the evidence in the record. One may merely hire an expert who will assert that such as he or she reasonably relies on the data and presto! the inadmissible becomes admissible in Federal court. To the contrary, in the Michigan courts, such precludable evidence is rendered on the dung heap of inadmissibility without surcease under [Michigan Rule of Evidence] 703.<sup>45</sup>

The quoted Michigan opponent of the federal approach raises the specter of unexpurgated admission of expert background material. The opponent's position is strengthened by cases which construe the Federal Rule to permit or require the introduction into evidence of background hearsay information.

Michigan is not alone in citing the admissibility of hearsay evidence through expert witnesses as a decisive factor in considering whether to adopt the Federal Rules. The Supreme Judicial Court of Massachusetts reviewed the debate and concluded: "Because of the problems now arising under Rule 703, we are not persuaded we should accept the principles of the proposed rule."<sup>46</sup>

The impression conveyed by such criticisms distorts the effect of Federal Rule of Evidence 703. The more liberal admissibility permitted under Federal Rule 703 has several advantages over the more restrictive approach exemplified by current Michigan law. It modernizes expert witness practice by align-

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44. Michael D. Wade, Counterpoint, *Should Michigan Rule of Evidence 703 Be Revised?*, 70 MICH. B.J. 572, 572 (1991).

45. *Id.* at 575 (citation omitted).

46. Department of Youth Services v. A Juvenile, 499 N.E.2d 812, 821 (Mass. 1986).

ing courtroom procedures with the day-to-day practice of doctors, engineers, psychologists, and other specialists.<sup>47</sup> Rule 703 sweeps away outdated restrictions by allowing a courtroom expert to state opinions based on non-record information.<sup>48</sup> Under the Federal Rules, experts can provide courtroom opinions based on data reviewed by the expert outside of court, even though some of that information might not be admissible in evidence.

### III. SHOULD FEDERAL RULE OF EVIDENCE 703 BE REVISED?

Can the problems of Rule 703 be corrected by appellate court interpretations? Although there are a growing number of opinions leading in the proper direction, some courts endorse the passive approach that allows wholesale admission of underlying documents. Accordingly, some authorities believe that explicit statutory clarification is needed. The American Bar Association Criminal Justice Section's Rules of Criminal Procedure and Evidence Committee has suggested a revision of Federal Rule of Evidence 703.<sup>49</sup> Chairperson Paul F. Rothstein subsequently explained the basis for the suggested change:

What criminal trial lawyer has not been frustrated by an opposing expert witness who, during direct examination, orally dumps into the record for the jury to hear, hearsay statements of others, the contents of inadmissible documents, and loads of other inadmissible evidence, upon which the expert says he "relied" in forming his opinion? The expert may know the opposing lawyer hasn't heard this material earlier and isn't prepared for it. For all the opponent, court, and jury know, it may be extremely unreliable. The Federal Rules of Evidence leave the door open for experts to make this end run around hearsay and other rules. Rule 703 provides in relevant part that the "facts and data" underlying expert opinions need only be "of a type reasonably relied upon by experts in the particular field. . . ." Reliance by an expert is generally deemed to license admissibility. The opponent has little opportunity to confront underlying people and sources and expose weaknesses. This may discourage cross examination altogether. In consequence, the jury may be deceived into thinking a weak opinion is unassailable. The system (as well as the opponent) is the loser.<sup>50</sup>

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47. Brian J. Benner & Ronald L. Carlson, Point, *Should Michigan Rule of Evidence 703 Be Revised?*, 70 MICH. B.J. 572, 572 (1991).

48. Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 592 (1986).

49. *Federal Rules of Evidence: A Fresh Review and Evaluation*, 120 F.R.D. 299 (1987).

50. Paul F. Rothstein, *Needed: A Rewrite*, CRIM. JUST., Summer 1989, at 20, 21-22.

The ABA Committee Report proposed restrictions on the admissibility of an expert's otherwise inadmissible basis material.<sup>51</sup> A Minnesota advisory committee took a similar position. As amended in 1990, Minnesota Rule 703 reads as follows:

(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.<sup>52</sup>

Some of the procedural incidents of the Minnesota rule should be mentioned. The Minnesota rule does not forbid experts from mentioning that they consulted outside sources in forming opinions.<sup>53</sup> To demonstrate the care involved in their study of the case, experts are allowed to testify that they conferred with other experts. To this end, they can identify the other experts but may not detail the nature of their opinions.<sup>54</sup> In other words, an expert may identify the various sources for her opinion and give a general description of the subjects discussed in underlying reports.<sup>55</sup> However, the expert may not spread hearsay before the jury except under limited circumstances.<sup>56</sup>

Unfortunately, some trial courts applying unrevised Federal Rule 703 have allowed experts to do exactly that. Such an approach ignores the law's usual concerns about a party's face-

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51. See *id.* at 22.

52. MINN. R. EVID. 703.

53. See MINN. R. EVID. 703 committee comment ("The rule is aimed at permitting experts to base opinions on reliable hearsay and other facts that might not be admissible under these rules of evidence.").

54. See Roger C. Park, *Confining the Expert: Rule 703(b) of the Rules of Evidence*, BENCH & BAR OF MINN., Mar. 1990, at 33, 34 (1990).

55. See Carlson, *supra* note 48, at 584 & n.23 (hearsay and confrontation concerns would seem minimal when an expert simply identifies a background document as a basis for his opinion, or describes the general subjects discussed in an underlying report).

56. See MINN. R. EVID. 703 committee comment ("Although an expert may rely on inadmissible facts or data in forming an opinion, the inadmissible foundation should not be admitted into evidence simply because it forms the basis of the expert opinion."); Park, *supra* note 54, at 35.

to-face encounter with adverse witnesses, as well as the requirements of an oath, personal presence, and cross-examination.<sup>57</sup> Revisions such as Minnesota's Rule 703(b) will help prevent the use of experts as a substitute for calling other witnesses.<sup>58</sup>

Until the rules are clarified, lawyers need to make vigorous hearsay and, in criminal cases, confrontation objections when challenging opposing experts in these situations. When addressing such objections courts should differentiate scientific literature in the expert's field, as well as general theories, research and studies that guide the expert's work, from case-specific information drawn from sources involved in the particular case at issue.<sup>59</sup> In a medical case, for example, the latter would include patient statements, laboratory tests, consultations and diagnoses of the party by other doctors. The materials in the

57. Olin G. Wellborn, III, *Demeanor*, 76 CORNELL L. REV. 1075, 1092-94 (1991) (citing *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988), and analyzing the various considerations which underlie the Confrontation Clause).

*California v. Green*, 399 U.S. 149 (1970), set forth some of the traditional essentials of confrontation:

The primary object [of the right to confront witnesses] was to prevent depositions or *ex parte* affidavits . . . in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

*Id.* at 157-58 (citing *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

58. See Park, *supra* note 54, at 35. Louisiana has taken special steps in criminal cases to preclude reference on direct examination to inadmissible evidence forming the basis of the expert's opinion. While the expert can recite the basis for his conclusions when these facts have been previously placed in the record, out-of-court hearsay cannot be recited on an expert's direct. The Louisiana Code of Evidence provides:

Art. 705. Disclosure of facts or data underlying expert opinion; foundation

A. Civil cases. In a civil case, the expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

B. Criminal cases. In a criminal case, every expert witness must state the facts upon which his opinion is based, provided, however, that with respect to evidence which would otherwise be inadmissible such basis shall only be elicited on cross-examination.

LA. CODE EVID. ANN. art. 705 (West 1992)

59. See Edward J. Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1, 2-3, 8 (1988) (promoting a "major/minor premise distinction" for general research and theories, and case-specific information). Professor Imwinkelried also points out

case-specific category may be used by the testifying physician to reach a conclusion, but are particularly subject to exclusion when admission is sought without foundation.<sup>60</sup>

#### IV. FUTURE DIRECTIONS

After almost two decades of experience with the expert witness rules embraced in the Federal Rules of Evidence, it is time to consider improvements.<sup>61</sup> The Federal Advisory Committee has recently done so in connection with Rule 702.<sup>62</sup> Not-

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the fallacy of attempting to cure the problem set forth in this Article with limiting instructions. *Id.* at 12, 26.

Some courts operate under rules carefully crafted to insure that there is good cause to admit underlying data which appears to be particularly trustworthy. *See, e.g.,* *Uniprop Manufactured Hous., Inc. v. City of Lakeville*, 474 N.W.2d 375, 379-80 (Minn. Ct. App. 1991) (discussing bases for trustworthiness under Minnesota Rules of Evidence Rule 703(b)). In *Schuchman v. Stackable*, 555 N.E.2d 1012 (Ill. App. Ct. 1990), the Illinois Court of Appeals upheld the trial court's refusal to allow plaintiff's expert witness to read excerpts from medical treatises into evidence. *Id.* at 1024-26. In a dissenting opinion, Justice Chapman, quoting at length from Professors Carlson and Imwinkelried, distinguished between materials contained in learned treatises—which are particularly trustworthy—and case-specific materials which a jury is more likely to misuse. He would have admitted the excerpts from the medical treatises. *Id.* at 1036-40 (Chapman, J., dissenting).

60. *See* Imwinkelried, *supra* note 59, at 10-13.

61. Resort to scientific proof is increasing the need for pretrial disclosure of the substance and basis of an expert's expected testimony in criminal matters. Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND L. REV. 791, 798-99 (1991).

Regarding the conditions which dictate active judicial oversight of the expert witness process, see *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230 (5th Cir. 1986), where the court stated:

[T]he professional expert is now commonplace. . . . [While] we adhere to the deferential standard for review of decisions regarding the admission of testimony by experts . . . [that] standard leaves appellate judges with a considerable task. We will turn to that task with a sharp eye, particularly . . . where the record makes it evident that the decision to receive expert testimony was simply tossed off to the jury under a "let it all in" philosophy. Our message to our able trial colleagues: it is time to take hold of expert testimony in federal trials.

*Id.* at 1234.

62. FED. R. EVID. 702 advisory committee's note (proposed amendments), 137 F.R.D. 156, 156-67 (1991). Proposed Rule 702 provides:

Rule 702. Testimony by Experts

Testimony providing scientific, technical, or other specialized information, in the form of an opinion or otherwise, may be permitted only if (1) the information is reasonably reliable and will substantially assist the trier of fact to understand the evidence or to determine a fact in issue and (2) the witness is qualified as an expert by knowledge, skill, experience, training, or education to provide such testimony. Except with leave of court for good cause shown, the witness shall not testify on direct examination in any civil action to any opin-

ing that the use of expert testimony has greatly increased since enactment of the Federal Rules of Evidence, the Committee promulgated revisions designed to clarify the trial court's role in investigating a witness's supposed expertise. One aspect of this revision is to dispel any doubts that the court, acting under Rule 104(a), has the power and responsibility to decide whether and on what subjects expert testimony should be permitted in a case and whether the particular witness proffered as an expert has the necessary expertise to provide such testimony.<sup>63</sup>

The Federal Advisory Committee's concern for the quality and integrity of expert testimony is apparent in its comments:

While much expert testimony now presented is illuminating and useful, much is not. Virtually all is expensive, if not to the proponent then to adversaries. Particularly in civil litigation with high financial stakes, large expenditures for marginally useful expert testimony has [sic] become commonplace. Procurement of expert testimony is occasionally used as a trial technique to wear down adversaries. In short, while testimony from experts may be desirable if not crucial in many cases, excesses cannot be doubted and should be curtailed.<sup>64</sup>

These excesses suggest that an active role is also appropriate for judges observing abuses of Rule 703. Courts should actively police the bases of modern expert testimony. Detailed rendition of unauthenticated hearsay should be barred.<sup>65</sup> Gatekeeping by the trial judge is also needed in a related area, that of assuring the presence of a reliable basis for an expert's opinion.<sup>66</sup> The stuff on which experts base their opinions can be flimsy.<sup>67</sup> The solution is for the trial judge, before testimony, to assess the trustworthiness of the material which the expert relied upon. With traditional sorts of experts this review will often be summary, but in areas of novel expert opinions it might be extensive. If the foundation is suspect, the expert's testimony should be barred.<sup>68</sup>

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ion or inference, or reason or basis therefor, that has not been seasonably disclosed as required by Rules 26(a)(2) and 26(e)(1) of the Federal Rules of Civil Procedure.

*Id.* at 156.

63. *Id.* at 157. The proposed revision is now pending before the Federal Advisory Committee.

64. *Id.* at 156-57.

65. As this Article has suggested, hearsay and confrontation principles should suppress unauthenticated proof, whether that proof is offered as substantive evidence or under the "illustrate the basis" ploy. *See supra* notes 7, 39.

66. Benner & Carlson, *supra* note 47, at 573.

67. Carlson, *supra* note 39, at 59.

68. *Id.* Case authority is split regarding the right of a party to demand a pretestimony judicial inquiry into the trustworthiness of the underlying data.

The 1990's will likely mark a watershed for expert testimony in American trials. Judges and commentators are calling for changes, and rule drafters are responding. Professor David L. Faigman inveighs against what he sees as a current flood of inappropriate expert opinion.<sup>69</sup> He cites the management of scientific evidence as the most troubling issue confronting courts today.<sup>70</sup> Professor Faigman rightly decries the hesitant and inconsistent approaches utilized by courts to discharge their responsibilities. He asks for wholesale revision in the management of experts.<sup>71</sup>

Professor Faigman is technically correct that Rule 702 as presently constituted does not appear to require judges to determine the accuracy of expert testimony as a preliminary fact. However, the proposed revision of Rule 702 noted earlier seems to carry this directive.<sup>72</sup> It may be that the rule drafters should make the requirement even more explicit. Meanwhile, many would agree that they appear to be headed in the right direction.

Even more important than a reworking of Rule 702 is the attention required by Rule 703. Because of its control over the data which supports expert testimony, Rule 703 is in a pivotal position. The reforms urged in this Article and supplied by forward-looking revisions such as enacted in Minnesota will do much to control potential abuses.<sup>73</sup> Professor Faigman com-

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See Brian Simon, Comment, *The Basis of Expert Testimony: Ryan v. KDI Sylvan Pools Lets the Experts Have Their Way*, 43 RUTGERS L. REV. 1235, 1244-45 (1991) (noting that courts have taken two different approaches to assessing whether the standards of Rule 703 have been met). Several cases indicate that trial judges must assess the reliability of data underlying the expert's opinion. See, e.g., *Ricciardi v. Children's Hosp. Medical Ctr.*, 811 F.2d 18, 24-25 (1st Cir. 1987) (holding that an opinion, based on a doctor's handwritten note which an expert characterized as "bizarre", was properly excluded as unreliable); *In Re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1245 (E.D.N.Y. 1985) (Weinstein, C.J.) (requiring that courts determine whether hearsay underlying the expert's opinion satisfies "minimum standards of reliability"), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); *Nichols v. Schweitzer*, 472 N.W.2d 266, 276 (Iowa 1991) (upholding exclusion of trooper's opinion as to fact where based solely on witness interviews). The proposed revision of Rule 703 seems to promote this approach. See *supra* notes 49-51 and accompanying text.

69. See David L. Faigman, *Struggling to Stop the Flood of Unreliable Expert Testimony*, 76 MINN. L. REV. 877, 877-78 (1992).

70. *Id.* at 883.

71. *Id.* at 877, 884-85.

72. See *supra* note 62 and accompanying text.

73. I have suggested elsewhere the addition of the following provision to Rule 703:



plaints that such reforms, while perhaps well-intentioned, are too narrow.<sup>74</sup> That assertion is rejected. Enactment of a federal provision to police the regular and wholesale admission of expert background data which cannot pass the admissibility tests supplied by other rules of evidence is needed. Such a provision will go far in ensuring the fairness of trials involving experts, and should inspire emulation by the states.

The Minnesota experience demonstrates that revision of Rule 703 is feasible, as well as important.<sup>75</sup> On the other hand, ambitious plans for large-scale restructuring of the expert rules

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In criminal cases, and generally in civil cases, underlying expert data must be independently admissible in order to be received in evidence. An expert's reliance on unadmitted data does not mandate introduction of the data, where the sole reason for introduction is that it formed a basis for the expert's opinion. When good cause is shown in civil cases and the underlying information is particularly trustworthy, the court may admit the data under this rule to illustrate the basis for the expert's opinion.

Carlson, *supra* note 39, at 38.

74. Faigman, *supra* note 69, at 886.

75. The balance between overmanagement and undermanagement of cases needs to be spelled out in carefully crafted standards. Consider, for example, *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991) (en banc) (per curiam), *petition for cert. filed*, 60 U.S.L.W. 3406 (U.S. Nov. 12, 1991) (No. 91-785). The Fifth Circuit had earlier stated that district judges must carefully review an expert's opinion to ensure that the expert has the necessary qualifications and a sufficient basis for the proffered testimony. *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1431 (5th Cir.), *cert. denied*, 493 U.S. 935 (1989). In *Christophersen*, an expert for the plaintiff concluded that an employee's exposure to nickel and cadmium at the defendant's plant caused the cancer that resulted in plaintiff's death. 939 F.2d at 1109. However, in the view of the court, this expert "offered no scientific methodology to support this assertion" of causation. *Id.* at 1115. The defense relied on an expert who stated that plaintiff's assertion "that nickel and cadmium have been associated with a certain type of cell in lung cancer and therefore should be associated with a similar type of cell in the colon has no support in medical science and is without foundation." *Id.* (quoting the expert). Deeming the plaintiff's proof to be a "scientific hunch" which was not generally accepted within the relevant scientific community—a test first announced in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)—the court affirmed summary judgment in favor of the defense in this toxic tort action. *Id.* at 1115-16.

The dissent criticized application of the *Frye* test: "Today the court 'takes hold' of expert testimony by taking over. The per curiam opinion effectively allows judges to decide the reliability, weight, and relative merit of expert opinions, at least in toxic tort cases." *Id.* at 1122 (Rearley, J., dissenting). The dissent added, "[u]ntil today, we soundly limited the *Frye* doctrine to particular techniques, 'novel scientific evidence,' that reflect the factual context of *Frye*. . . . [T]he Fifth Circuit has never excluded otherwise relevant evidence strictly on the basis of lack of general scientific acceptance." *Id.* at 1133 (footnote omitted).

The decision underlines the point that full judicial activism, while com-

across the board may well founder. Legislators and local evidence committees tend to avoid wholesale overhaul of a structure, particularly when less drastic modifications hold some promise for improvement of the system.

### CONCLUSION

Difficult issues involving expert testimony are not new.<sup>76</sup> At least since the time of Learned Hand, courts and commentators have observed that expert testimony creates the risk of a special kind of prejudice.<sup>77</sup> Expert testimony has increased markedly since the enactment of the Federal Rules of Evidence and it is time for courts to rein it in. Judicial activism is needed in the management of litigation generally, and particularly with expert witnesses.

A number of judicial opinions have endeavored to prevent potential violations. Other rulings, however, have not safeguarded rights with due vigilance. In this uncertain climate, path-breaking revisions need to be considered for inclusion in the Federal Rules of Evidence. Their incorporation is necessary to clarify the appropriate status of the expert's underlying data.

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mendable, must proceed under standards which guide the court's review of scientific evidence. See Carlson, *supra* note 48, at 586-90.

Professor Faigman advocates retaining the distinction between scientific expert testimony and ordinary experts with regard to the role of the judge in evaluating scientific evidence. David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1084 (1989).

76. See, e.g., *Ladner v. Higgins, Inc.*, 71 So. 2d 242 (La. Ct. App. 1954). In response to the question, "Is [it] your conclusion that this man is a malingerer?" defendant's expert responded, "I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a post traumatic condition." *Id.* at 244.

77. *Christophersen*, 939 F.2d at 1112 n.10 (citing Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901)).

